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339185—55

In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 657

J. STACEY HENDERSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The majority and dissenting opinions of the court of appeals (Pet. 30–46; R. 3–18) [1] are reported at 218 F. 2d 14.

JURISDICTION

The judgment of the court of appeals was entered on January 14, 1955 (Pet. 29; R. 1). A petition for rehearing was denied on February 18, 1955 (Pet. 46; R. 20). The petition for a

[1] The designation "R" refers to the proceedings on appeal. "Tr." refers to the portion of the transcript of the trial proceedings printed as an appendix to appellant's (petitioner's) brief filed in the court of appeals.

writ of certiorari was filed on March 16, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the prosecuting attorney's arguments were prejudicial.

2. Whether the attitude of the trial judge and allegedly irrelevant evidence deprived petitioner of a fair trial.

STATEMENT

Petitioner was convicted of using the mails in a scheme to defraud in the sale of interests in oil and gas leases (Tr. 2–8, 514).[2] He was sentenced to a term of imprisonment of five years and to a fine of $1,000 (Tr. 524). On appeal the conviction was affirmed, one judge dissenting (R. 1).

The evidence in support of the verdict may be summarized as follows:

In 1948, petitioner, an oil promoter, acquired from one Lambert for approximately $500.00 a lease on 33.45 acres in Caddo Parish, Louisiana (tract no. 1) on which there was a well which had been pumped by Gulf Oil and abandoned in

[2] Petitioner's first trial under a ten-count indictment ended in a conviction under count one and an acquittal under the remaining nine counts. On appeal, the court of appeals upheld the sufficiency of the evidence to support the conviction but reversed for certain trial errors, not here relevant (202 F. 2d 400).

1914 (Tr. 50, 60–62, 64, 120–121, 204, 280, 286–287). Through his nephew, who was living in Memphis, petitioner met various residents of that city, and began a campaign to persuade them to buy 1/32nd interests in the lease for $1,000 each (Tr. 174–177, 293). He represented that he had paid about $6,000 for his lease, that the property had been tied up in litigation over a period of years, that he was able to buy it through the use of political influence, that the old oil well on the property was full of oil, and that his success in finding oil was a certainty (Tr. 92–93, 112–113, 142–143, 175–177, 204). As a result of these representations, various persons invested in the lease (Tr. 93, 138–139, 176, 177, 205). When the sales of the lease were completed, petitioner had sold 35 3/4 units of 1/32nd each and retained no interest for himself (Tr. 218, 307).

Under his contract with the investors, petitioner agreed to drill a test well (Tr. 364; Ex. 1, Tr. 161–163). One such well was started and abandoned (Tr. 301, 304–305). Another did produce oil and it was pumped for a few months (Tr. 305, 310–311, 412–413), but production was not sufficient to be profitable, and it was abandoned (Tr. 311, 355).

During the time that the well was producing, investors were shown the oil and were pleased with their investment (Tr. 180–181, 184, 211–212, 249). Before the well had been abandoned, pe-

titioner began to sell interests on tract no. 2, which consisted of 5 acres adjacent to the first tract (Tr. 67, 354–355). Petitioner's interest in this tract had been acquired in June, 1948, without cost to him, and he did not bother to record his lease thereon (Tr. 63–64, 379).

Petitioner sold interests in the second tract for $1,000 for each 64th (Tr. 185). He represented that a well on this land would produce from 500 to 1,000 barrels daily and that there was no way one could possibly lose money on it (Tr. 183). Petitioner told one Pirtle that the well on tract no. 1 was doing so well, he was going to drill another well on tract no. 2 "right against the fault, and the mother pool." He added "We know we are going to get money * * *. There is no way to keep us from it. * * *Now we know what we have got." (Tr. 185.) As a result, Pirtle invested and told all of his friends to do so, including Keller (Tr. 184, 186–187, 196). To effectuate this sale, Keller mailed Pirtle a .$500.00 check payable to petitioner. Pirtle obtained a contract for Keller and had the check deposited in petitioner's account. (Tr. 160–164, 187.) It was the mailing of this check which formed the basis of the indictment.

A well was dug on tract no. 2 at very little cost since petitioner put no casing in it (see Tr. 375). It produced nothing (Tr. 266, 336). Petitioner sold a total of 50 interests in tract no. 2 (Tr. 374–375).

In rebutting petitioner's defense that he acted in good faith in selling the leases upon information that the leases would result in excellent oil production (Tr. 288), the government introduced expert evidence which indicated that petitioner could have had no basis for expecting oil to be produced in commercial quantities on these leases (Tr. 428–442).

ARGUMENT

1. Petitioner claims that his conviction should have been reversed because of statements by government counsel (a) expressing a belief in petitioner's guilt and (b) relating to the financial condition of petitioner's victims. The argument was properly rejected by the court below.

a. The remarks of the prosecutor to which petitioner addresses his main objections, and which were the basis of the dissent below, are as follows:

During opening argument (Tr. 469–470):

> Mr. VADEN. * * * These things happen all the time. You read about it, and you like to stand around corners and say, "Why doesn't the Government do something about all this stuff?" I have heard you. "They ought to do something about it. They ought to get these people doing this stuff." I have heard you. "They"—you are "they"—
>
> Mr. MOONEY. If the Court please, I object to that, it is arguing inflammatory—
>
> * * * * *

The COURT. Well, leave that out, Mr. Vaden.

Mr. MOONEY. We are trying this lawsuit—this only.

Mr. VADEN. I will take that back, the word "they." I will take that back, Your Honor. But this is the Government. This is the Government. You are the Government. You are the people that have got to decide this thing. There are just twelve people. They are you. His Honor can't decide it. I can't decide it. I get so much a month; it is passed out—so does Mr. Joyner—Mr. Hodges. So does Millsaps Fitzhugh, the United States Attorney.

This Grand Jury indicted this man, and when they indict him, we are going to prosecute him. And that is what I am paid for, what I am going to do. I took an oath. You took an oath. I am doing my duty. I am doing it. I am going to do it. It may not be big—but I am going to do it—hot or cold—if I believe a man guilty. And if I don't believe he is guilty, no one is going to make me stand here and prosecute him—not going to do it. * * *

During closing argument, over defense counsel's objection (Tr. 477):

And now it is dumped in your laps—see. We have about finished. Your own conscience—your own conscience. If your mind cannot rest easily on a verdict—if there is a reasonable doubt—answer me

> this—can your mind rest easily on a not guilty verdict?

We believe, with the majority of the court below, that these remarks did not constitute misconduct, and certainly not prejudicial misconduct justifying reversal of this conviction. The first statement in the opening argument was essentially an appeal to the civic responsibilities of jurors. Any possible doubt as to the propriety of the appeal was eliminated by the trial court's caution and government counsel's withdrawal of the word "they," which might conceivably have been misunderstood.

Counsel's statements relating to belief in petitioner's guilt were not an expression of personal knowledge of a disputed fact, such as the remarks condemned in *Taliaferro* v. *United States,* 47 F. 2d 699 (C. A. 9). They were merely statements that the prosecutor believed that on the evidence petitioner was guilty. Such an expression is implicit in every prosecution argument urging that the defendant be convicted. Cf. *United States* v. *Battiato,* 204 F. 2d 717 (C. A. 7), certiorari denied, 346 U. S. 871; *United States* v. *Holt,* 108 F. 2d 365, 369–370 (C. A. 7), certiorari denied, 309 U. S. 672; *DiCarlo* v. *United States,* 6 F. 2d 364, 368 (C. A. 2), certiorari denied, 268 U. S. 706; *Tuckerman* v. *United States,* 291 Fed. 958, 969 (C. A. 6), certiorari denied, 263 U. S. 716. Considered as a whole, the prosecutor's argument contains nothing essentially unfair.

In his final charge to the jury, the judge frequently admonished them to consider only the law and the evidence, to give the evidence "full, fair and impartial consideration" (Tr. 478, 487, 489, 492, 500). He told them they were "not partisans or advocates in this matter, but are judges", and that they would make a contribution to judicial administration by "a just and proper verdict in this case" (Tr. 493). The sober and careful instructions of the trial judge were a more than sufficient counterweight against the few statements petitioner gleans from a long trial as an asserted basis for reversal.

b. The prosecutor's observations concerning the economic condition of petitioner's victims supply even less basis for further review. Although the trial judge overruled petitioner's objection during argument (Tr. 467), he did thereafter instruct the jury as follows (Tr. 472):

> The COURT. While it occurs to me, ladies and gentlemen, some slight point is being made in this case on trial concerning the economic status of some of the Government's witnesses, particularly, as I recall, the witness Ford.
>
> Now, these things, ladies and gentlemen, do develop sometimes in the heat of argument. But the fact alone that an alleged investor or victim of a scheme to defraud was not a man of means is not important in your consideration of the issues in this case. I am sure you understand this.

> But don't be influenced one way or another by such arguments in this case.

Moreover, in his final instructions, the judge admonished the jury that they were to disregard any appeal to sympathy and prejudice and determine the verdict solely from the law and the evidence (Tr. 478, 500).

2. Petitioner has combed the record for other incidents which he characterizes as prejudicial (Pet. 9–17), and now argues that the cumulative effect thereof deprived him of a fair trial. However, a mere reading of petitioner's illustrations is sufficient to show that, as all the judges in the court below agreed, there is no merit in his contention. For example, it hardly shows bias on the part of the trial judge that when petitioner requested that witnesses be instructed not to talk while counsel offered objections, the judge stated that "those are matters within the control of the Court at the proper time. And the Court will have no way of making any ruling that will control those kind of things" (see Pet. 9–10). Similarly, it takes a degree of imagination to find prejudicial bias in the remarks of the court, which petitioner cites twice (Pet. 13–14, 17), that it was hot and getting late, and that counsel should "move on".

As to most of the examples which petitioner cites of allegedly improper testimony by government witnesses, the judge directed the jury to

disregard such testimony (Pet. 11, 14–15). To the extent that such testimony related to the economic condition of the witnesses, it may be noted again that, at the close of the trial, the court charged that the economic status of the victims was not to be considered by the jury (Tr. 472).

No useful purpose would be served by discussion of each of petitioner's references. On their face they appear to be, as they were, minor and unprejudicial incidents of a kind likely to occur in any sharply contested trial. They were correctly dismissed by the court below as grounds for reversal. They present no basis for certiorari.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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